No. 75-989

In the Supreme Court of the United States

OCTOBER TERM, 1975

DAVID LEON RUYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Washington, D.C. 20530.

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Petitioner Ruyle, a registered distributor of the controlled substance secobarbital, contends that there was insufficient evidence to support his conviction of distributing that substance in violation of 21 U.S.C. 841(a)(1); that the indictment was defective because the government failed to advise the grand jury that petitioner was a registered distributor of secobarbital; and that petitioner's consent to a search of his residence was involuntary.[1]

Following a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner

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[1]The instant petition asks this Court to review the convictions of both petitioners, but it does not state what relevance any of the issues raised has to petitioner Medilab's conviction for falsely reporting the sale of 100,000 secobarbital capsules, in violation of 21 U.S.C. 843(a)(4). Indeed, the petitioners' discussion of the questions presented is phrased solely in terms of petitioner Ruyle.

Ruyle was convicted on one count of distributing secobarbital, in violation of 21 U.S.C. 841(a)(1), and petitioners Ruyle and Medilab (a corporation owned and operated by Ruyle) were convicted on one count of furnishing false reports and records required to be kept concerning controlled substances, in violation of 21 U.S.C. 843(a)(4). Petitioner Ruyle was sentenced to two years' imprisonment, to be followed by a special parole term of two years, and a $5,000 fine. Petitioner Medilab was fined $5,000. The court of appeals affirmed (Pet. App. C).

1. Petitioner Ruyle was registered with the Bureau of Narcotics and Dangerous Drugs (BNDD)[2] to distribute secobarbital and other controlled substances in Schedules II through V of the Controlled Substances Act. In June 1971, he met Alvin Katzen, a salesman for Ciba Pharmaceutical Company, a registered manufacturer of controlled substances (Tr. 8-12).[3] Katzen advised Ruyle that he knew a number of doctors who would be interested in purchasing controlled substances and who would not "have to keep" any records of the transactions (Tr. 12).[4] Katzen in fact had no such arrangement (Tr. 13).

Shortly after this meeting until April of 1972, on approximately ten separate occasions Ruyle sold Katzen secobarb-

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[2]The BNDD was the predecessor of the Drug Enforcement Administration.

[3]"Tr." refers to the trial transcript. Katzen was not registered with the BNDD, but he was not required to register so long as the company for which he worked was registered, as it was, and so long as he possessed controlled substances only while "acting in the usual course of his business or employment." 21 U.S.C. 822(c)(1).

[4]21 U.S.C. 828 requires that distributions of controlled substances in Schedules I and II be pursuant to special order forms and that a duplicate of such a form be preserved by the person receiving the controlled substance. The distributor is required to preserve the original order.

ital, duobarbital, and dextroamphetamine (Schedule III substances), in quantities of tens of thousands of capsules (Tr. 14-18). Ruyle charged from $15 to $30 per thousand capsules (Tr. 14). Ruyle often delivered the capsules in containers which were either unlabeled or labeled as vitamins. On other occasions, the containers were properly labled with petitioner's trade name, Pointe Distributors, and with the appropriate lot and control numbers. After Katzen purchased the drugs from Ruyle, he removed the labels (Tr. 18-19).

On April 14, 1972, Katzen arranged to purchase 30,000 capsules of secobarbital from Ruyle. Katzen, who then was cooperating with the BNDD following his arrest on state drug charges, met Ruyle in a restaurant parking lot. Katzen gave Ruyle $250 in marked money in exchange for the secobarbital, which Ruyle obtained from the trunk of his car (Tr. 19-27).[5]

On May 9, 1972, BNDD agents arrived at Ruyle's residence. After Ruyle admitted the agents, they advised him that they had two warrants—one authorizing his arrest and the other authorizing the agents to enter and inspect petitioner Medilab's business premises, which were located about one block from Ruyle's residence (Hr. 4-7).[6] The agents then arrested Ruyle, advised him of his *Miranda* rights, and asked where he kept his business records and a certain typewriter used by petitioner in preparing records (Hr. 7-8).

Ruyle replied that the records and typewriter were in his residence. The agents informed him that the inspection warrant did not authorize a seizure of items from

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[5]This sale formed the basis of petitioner Ruyle's conviction under 21 U.S.C. 841(a)(1).

[6]"Hr." refers to the suppression hearing transcript.

his residence and that they did not have another warrant authorizing such a seizure (Hr. 8-9). The agents advised Ruyle that the items could not be seized without his consent and that "he could sign a consent to search if he so desired" (Hr. 9). One agent then read a consent form to Ruyle; Ruyle signed the form and then led another agent to the basement of his residence, where the records and typewriter were located (Hr. 9-10).

2. Petitioner Ruyle contends (Pet. 9-12) that there was insufficient evidence to support his conviction for unlawfully distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1). He does not claim that he was exempt from prosecution under that section by virtue of his registration as a distributor, and he acknowledges (Pet. 9) that "[s]uch an argument would now be foreclosed" by this Court's decision in *United States* v. *Moore*, No. 74-759, decided December 9, 1975.

The evidence was sufficient to show that Ruyle's distribution of secobarbital to Katzen on April 14, 1972, was unlawful. The district court was justified in concluding that Ruyle's registration did not authorize him to distribute secobarbital to Katzen, that Ruyle had an obligation to inquire into Katzen's authority to possess the secobarbital and that he failed to do so, and that Ruyle knew that the secobarbital he distributed to Katzen would be diverted from legitimate channels.[7]

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[7]As this Court noted in *United States* v. *Moore*, *supra*, slip op. 12-13:

> Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels. *Id.*, at 6; S. Rep. No. 91-613, *supra*, at 4; 116 Cong. Rec. 996 (1970) (remarks of Senator Dodd). It was aware that registrants, who have the greatest access to controlled substances and therefore the greatest opportunity for diversion, were responsible for a large part of the illegal drug traffic. See 116 Cong. Rec. 1663 (1970) (remarks of Senator Hruska); 116 Cong. Rec. 998 (1970) (remarks of Senator Griffin).

The prohibitions of 21 U.S.C. 841(a)(1) apply to "any person" who unlawfully distributes. Petitioner violated that section when he sold drugs, as he did here, "not for legitimate purposes, but 'primarily for the profits to be derived therefrom' [H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. 3 (1970)]." *United States* v. *Moore*, *supra*, slip op. 12.[8] Indeed, Ruyle's sale of secobarbital to Katzen on April 14, 1972, was part of a series of approximately ten sales of controlled substances to Katzen, which Ruyle knew resulted in the diversion of these substances from legitimate channels of distribution, contrary to Ruyle's duty to guard against such diversions. See 21 C.F.R. 1301.71.[9]

Ruyle's knowledge of the illegality of the sales was demonstrated by his desire to keep his sales to Katzen secret, his belief that Katzen's customers would not keep records of the transactions, and his use of falsely labelled containers. Finally, the evidence demonstrated that Katzen was authorized to possess the secobarbital only in his capacity as a salesman for Ciba Pharmaceutical (see note 3, *supra*). Thus, Ruyle had a duty to make a good faith inquiry into Katzen's authority to possess secobarbital before distributing it to him. See 21 C.F.R. 1301.74. Ruyle failed to do this.

3. Petitioner Ruyle claims (Pet. 12-13) that an alleged failure by the prosecutor to apprise the grand jury of

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[8]As the Court noted in *Moore* (slip op. 8-9), the statutory scheme makes clear that 21 U.S.C. 841(a) must be read in light of 21 U.S.C. 822(b), which provides that registrants may distribute controlled substances only "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." The Controlled Substances Act thus provides only "a qualified authorization of certain activities, not a blanket authorization of all acts by certain persons."

[9]See notes 3, 7 and 8, *supra*.

his registration with the BNDD to distribute secobarbital invalidated the count of the indictment charging him with distributing that substance. The court of appeals rejected this contention, noting that Ruyle's registration was only a defense on the merits and that the grand jury was not required to hear evidence of such a defense (Pet. App. C-4). This conclusion was correct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338; *Costello* v. *United States*, 350 U.S. 359, 363-364; *United States* v. *Levinson*, 405 F. 2d 971 (C.A. 6).[10]

4. Petitioner Ruyle finally asserts (Pet. 14) that his consent to the seizure of his typewriter and business records from his residence was involuntary because the BNDD agents allegedly told him that the inspection warrant authorized them to seize the items. The record shows precisely the contrary; the agents expressly advised Ruyle that the warrant did not authorize them to seize the business records and typewriter from his residence and that such a seizure could only be made with his consent. The record also demonstrates that, having

[10]Petitioner Ruyle is not aided by his reliance (Pet. 12) on *Johnson* v. *Superior Court of San Joaquin County*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792, where an indictment was dismissed because the grand jury was not given exculpatory evidence, in violation of a specific provision of the California Penal Code which requires a grand jury to hear such evidence. There is no comparable federal statute, nor is there a comparable requirement imposed by any federal court.

Petitioner Ruyle's reliance (Pet. 12) on *United States* v. *Daneals*, 370 F. Supp. 1289 (W.D. N.Y.), is similarly misplaced. There the dismissal of the indictment (comprising 153 selective service cases) was based on a totality of circumstances not present here. In *Daneals*, misleading information was given to the grand jurors, the hearsay nature of testimony was not made clear, an unauthorized person (the Selective Service Regional Counsel) was present before the grand jury, and the grand jurors were misled about the number of counts appearing in the final indictments.

been so apprised, petitioner voluntarily gave his consent.[11]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

[11]This Court has recently held that "the fact of custody alone has never been enough itself to demonstrate a coerced confession or consent to search." *United States* v. *Watson*, No. 74-538, decided January 26, 1976, slip op. 13. Here Ruyle's consent was given in his own residence, rather than in the police station. The agents advised him of his *Miranda* rights and that his consent was required before the items could be seized. Under these circumstances, the voluntariness of Ruyle's consent is evident. See *United States* v. *Watson*, *supra*; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225.